

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 January 2008

Case No: **2006-ERA-00012**

In the Matter of:

KENNETH W. BOWERS,
Complainant,

v.

BARTLETT NUCLEAR, INC.,
Respondent,

And

FLORIDA POWER & LIGHT COMPANY,
Party in interest.

DECISION AND ORDER DISMISSING CLAIM AS UNTIMELY APPEALED

This proceeding arises under the provisions of the Energy Reorganization Act of 1974 (ERA), as amended by 42 U.S.C. §5851. The rules set forth in 29 C.F.R. Part 18 apply to this proceeding except as modified by 29 C.F.R. Part 24.

The Complainant filed a complaint under this Act with OSHA on October 5, 2005.

The complaint was denied by OSHA on March 30, 2006. The OSHA letter dated March 30, 2006 stated

Respondent and Complainant have 5 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review.

The record suggests that an "appeal" by the Complainant to OALJ was not received until April 17, 2006.

The Respondent has alleged that the Complainant did not file a timely appeal from the OSHA determination.

Procedural History

The March 30, 2006 letter from OSHA states that

Respondent provides radiation protection and decontamination services to nuclear energy facilities throughout the United States. Complainant was employed by Respondent until being discharged on May 06, 2005. Complainant filed this discrimination complaint on October 06, 2005. The Complaint was timely filed.

At the time of Complainant's release, he was working for Respondent at the Turkey Point Nuclear Facility of Florida Power and Light Company (FPL) in Biscayne Bay, Florida. Complainant worked at this facility as a Senior Nuclear Health Physics Technician. Complainant began this assignment on March 30, 2005. Complainant alleges he was prematurely released from his work assignment at the Turkey Point location because Respondent learned he had previously raised concerns to management and the Nuclear Regulatory Commission (NRC) while working at the Saint Lucie Nuclear Facility. Complainant's work assignment at the Saint Lucie Nuclear Facility ended January 31, 2005.

Complainant is not employed by Respondent on a permanent or traditional full time basis. He was placed by Respondent on temporary work assignments at nuclear facilities during annual scheduled outages or "down time". During these times, Respondent calls upon a large number of workers to conduct the special services needed at the facilities. The investigation disclosed all employees utilized to work during the nuclear facility outages are typically employed for a period of thirty to ninety days. Due to the nature of the work, these work assignment are intermittent according to the stages of operation at all nuclear facilities. Employees are told and understand these assignments are temporary. Complainant is accustomed to this work schedule and reports for duty at various nuclear facilities throughout the United States.

Respondent denied Complainant's employment at the Turkey Point location was "terminated" on May 6, 2005 due to the alleged protected activity. First of all, Respondent denies knowledge of any complaint to the NRC, but acknowledged Complainant advised an FPL supervisor of a safety concern while he was last assigned at the Saint Lucie facility. Respondent claims Complainant's concerns were investigated and addressed by FPL. The investigation confirmed Respondent's contention that Complainant's release from work on May 6, 2005 was a routine Reduction in Force (RIF).

The OSHA letter in March was sent to the claimant at an address in Norfolk, Virginia. The April letter of appeal contained that same address.

In initially reviewing the case, the undersigned Administrative Law Judge noted that the Complainant stated that he last worked for the Respondent in March 2006. However, the Respondent had indicated that he was last employed in March 2005.

The undersigned issued two orders which, in part, directed the Respondent to provide all dates of the Complainant's employment.

In late October 2007, the Respondent acknowledged that subsequent to work at Turkey Point from March 30, 2005 to May 6, 2005, the Complainant was employed at Calvert Cliffs from February 13, 2006 to April 2, 2006.

The Complainant was directed to explain the delay in filing an appeal from the March 2006 letter from OSHA.

The Complainant responded and stated

The main reason I filed a timely (sic) appeal from OSHA determination dated March 30, 2006 is because prior to that date I was employed by Bartlett Nuclear, Inc. (BN) out of the state from my home residence. The job site was at Calvert Cliffs Nuclear Power Station (CCNPS) in Lusby, Maryland. At that time my home residence was Norfolk, Virginia. On March 27, 2006, I was involved with an OSHA-reportable accident.

Thereafter, the Respondent indicated that the Complainant proceeds to state in his letter of October 11, 2007 filed in response to Order No. 2 that the injuries that he sustained required medical treatment; that he was transported by Bartlett Nuclear, Inc. supervision to Calvert Memorial Hospital's Emergency Room; that he was treated by a doctor and given pain medication, and that shortly thereafter he was returned to Norfolk, Virginia to continue medical treatment for the injury. He concludes by stating:

Given that I had returned to my home residence injured and medicated while working out of state, I still responded to the March 30, 2006 OSHA letter that I received some time in April. I tried consulting legal help on this matter, but was unable. Shortly after I received that letter I took a short moment not to be under the influence of pain medications for a short period of time and I wrote the response letter as best I could at that time (April 14, 2006).

The Respondent calls attention to the medical reports in late March 2006. There is no suggestion that the nature of this injury was such that he was incapable of reading and understanding the need to proceed in the time prescribed by the determination.

The Respondent argues that the Complainant's representation of the injury he sustained and the date of the injury is sufficiently deceptive and devoid of fact depriving him of the right to rely on equitable tolling.

The Complainant was seen by Dr. Neff in Norfolk, Virginia on March 31, 2006 for complaints of a

postoperative problem with the right knee which seemed to begin with an accident at home when he his wife accidentally sat on his knee and he had increasing pain and swelling. He was doing well postoperatively until that point.

MRI FINDINGS: An MRI done on 03/23/06 at my recommendation, in Maryland, because of persistent right knee problems showed arthritis of the

medial tibia femoral component, although little was seen on his arthroscopy. It also showed tearing of the posterior horn of the medial meniscus.

Dr. Neff stated that

His current knee problems are a result of the 01/15/05 knee injury rather than of the 03/27/06 injury.

WORK STATUS: I asked him to continue out of work until postoperative.

PLAN: I have discussed his arthroscopic findings with him once again and we are going to go ahead with surgery and I discussed the procedure with him.

In late April 2006, the Complainant filed a claim with the Maryland Workers' Compensation Commission. He stated that on March 27, 2006

**WHILE WALKING INSIDE NUCLEAR REACTOR CONTAINMENT
BLDG I JUMPED TO AVOID SOME WELDING SPARKS/FIRE THAT
FELL DIRECTLY IN FRONT OF ME AND TWISTED MY KNEE.**

THE DOCTRINE OF EQUITABLE TOLLING

In essence, the Complainant has indicated that he was physically impaired from March 27, 2006 until he filed his appeal on April 17, 2006.

The Courts have held that time limitation provisions in like statutes are not jurisdictional, in the sense that a failure to file a response within the prescribed period is an absolute bar to administrative action, but rather are analogous to statutes of limitation and thus may be tolled by equitable consideration. School District of the City of Allentown v. Marshall, 657 F.2d 16 (3d Cir. 1981); Coke v. General Adjustment Bureau, Inc., 64 F.2d 584 (5th Cir. 1981); and Donovan v. Hakner, Foreman & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984). The Court in School District of the City of Allentown, warns, however, that the restrictions on equitable tolling must be scrupulously observed; the tolling exception is not an open invitation to the courts to disregard limitation periods simply because they bar what may be an otherwise meritorious cause. Accord, Rose v. Dole, 945 F.2d 1331, 1336 (5th Cir. 1991).

Observing that "statutes of limitations and other similar filing deadlines should be equitably modified only in exceptional circumstances", the Administrative Review Board ("ARB") applied the Allentown Court's rationale to complaints of discrimination under the Energy Reorganization Act in Charles Hill, et. al and Edna Ottney v. Tennessee Valley Authority, 97-ERA-23 at 23-2, 87-ERA-27 (Sec'y April 21, 1994). The ARB has stated that the principle of equitable tolling may apply in other circumstances in addition to those stated by the Allentown Court: where (1) a claimant has received inadequate notice; (2) a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted on; or (3) the court has led the plaintiff to believe that he had done everything

required. Spearman v. Roadway Express, Inc., 92-STA-1 (Sec'y Aug. 5, 1992), citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam); Irwin v. Veterans Administration, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990).

The Board has held that the time limit for filing a request for hearing is not jurisdictional, and is subject to the principles of equitable tolling. See, Shelton v. Oak Ridge National Laboratories, et al., ARB Case No. 98-100, March 30, 2001; Reid v. Niagara Mohawk Power Corporation, ARB Case No. 03-154, October 19, 2004; Howlett v. Northeast Utilities, ARB Case No. 99-044, March 13, 2001. Therefore, the fact that Complainant failed to comply with the time limits set forth at 29 C.F.R. §24.4(d)(2) does not automatically bar adjudication of his complaint. I must determine whether equitable tolling applies in these circumstances.

There is no indication that OSHA provided misleading information or sent the notice to an incorrect address. There is nothing in the record to imply that the Respondent interfered in the process in late March 2006 or provided contradictory information regarding this complaint.

The Complainant sought medical attention in Norfolk and the OSHA letter was sent to his address in Norfolk several days later.

The report from Dr. Neff does not suggest that the Complainant was physically incapacitated or heavily medicated between late March and mid-April 2006.

Conclusion

In consideration of the filings of the parties, the statute, regulations and applicable law, I find that Complainant has not shown good cause that his request for hearing was timely filed, or that equitable tolling applies. Accordingly, Complainant's appeal should be dismissed, and OSHA's determination should be the final order of the Secretary.

RECOMMENDED ORDER

It is hereby recommended that the appeal and request for hearing filed by K.W.B. be dismissed and the determination rendered by OSHA be recognized as the final order of the Secretary.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review

Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).